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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-313

WILLIAM F. BUCKLEY, JR., NATIONAL REVIEW and M. STANTON EVANS,

Petitioners,

v.

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS,

Respondent.

No. 74-314

FULTON LEWIS, III,

Petitioner,

v.

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS,

Respondent.

PETITIONERS REPLY MEMORANDUM

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November, 1974

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This is a First Amendment case. Petitioners' claim is that contracts made by respondent union under

authority of §8(a)(3) of the National Labor Relations Act violate the First Amendment by preventing them from speaking on the air unless they are members in good standing of the union.

Respondents' opposition memorandum seeks to shift the argument to make it appear that petitioners are making an attack upon the system of collective bargaining as established by the NLRA.

Although their claim does not rest on that fact, petitioners point out that the union does not function as their exclusive representative in collective bargaining and that they derive no benefit from such bargaining.

Because the Court of Appeals rested its reversal of the District Court on the assumption that petitioners derive benefits from AFTRA representation, and because respondents also argue benefit, we shall discuss that point briefly.

In the District Court respondent union made no claim of benefit at all (petition, page 11); the District Court found that there was no evidence that petitioners in fact enjoy any AFTRA benefits other than enrollment in the pension plan. (petition, page 10; cf. JA. 12b-13b; 61c). In the Court of Appeals the union did not claim benefit by reason of the pension plan, but like their present opposition brief, argued that other provisions of the Code did provide benefit; petitioners argued that they did not, and the Court of Appeals rested its conclusion of benefit solely on the theory of enrollment in the pension plan. We note that the union does not, in this Court, despite this encouragement from the Court of Appeals, argue that such enrollment constituted a benefit.

Thus, despite the absence of any evidence in the record, and the fact that their theory of benefits was rejected by the courts below, respondents again strain the find some benefits flowing to petitioners from the union contract.

We do, however, urge that the Court not be distracted from petitioners' claim that, as to them, benefit or not, the union's actions under the authority of sec. 8(a)(3) violate the First Amendment.

POINT I

PITTSBURGH PRESS CO. v. HUMAN RELATIONS COMMISSION, 413 U.S. 376, 382, DOES NOT SUSTAIN A STATUTE BY WHICH PAYMENT OF DUES IS MADE A PREREQUISITE OF SPEAKING ON THE AIR.

The union has argued, and the Court of Appeals has agreed, that the doctrine that the press may be subjected to laws of general application covers this aspect of the case. In the Court below the union relied on *Branzburg v. Hayes*, 408 U.S. 665 (1972), and *Cox v. New Hampshire*, 312 U.S. 569 (1941). As shown by the petition, *Branzburg* and *Cox* carefully pointed out that prior restraint of speech was not involved (petition, pages 8-9). The union has abandoned these cases in this Court and turned to *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376 (1973), and *Associated Press v. National Labor Relations Board*, 301 U.S. 103 (1937). But no prior restraint of speech was involved in these cases either. Indeed the quotation

from *New York Times Co. v. Sullivan*, 376 U.S. at 266 (1964), in *Pittsburgh* at page 385 clearly distinguishes *Pittsburgh* from this case. The content of petitioners' broadcasts is in no sense commercial.

POINT II

PETITIONERS' ARGUMENT THAT THE DISTRICT COURT HAD JURISDICTION IS NOT ANSWERED BY REFERENCES TO AN ILLUSORY RIGHT TO RESIGN.

Substantially disregarding petitioners' arguments respecting pre-emption, the union airily says that petitioners may resign. But the union continues to do what it tells this Court it has no right to do. It has never modified §84 of the Code which forbids employment unless the performer is a *member*, nor has it notified employers that §84 may be disregarded. The letter from NBC to Rusher (petition, page 14), shows that §84 continues to be enforced by the employers. [emphasis supplied].

Before bringing this lawsuit, Buckley explicitly asked the union what would happen if he resigned and was informed that the union would, by utilizing its agreements with broadcasting employers, prevent him from broadcasting anywhere in the United States. (Buckley, JA. 30a). The District Court also found as an undisputed fact that Buckley was required by the AFTRA Code, and contracts with broadcasters ancillary thereto, to become *and remain* a member of AFTRA against his will (Buckley, JA. 31a) [emphasis supplied].

It might be that if petitioners did resign they could, after years of litigation, ultimately obtain a court ruling that the requirement of membership was not lawful. For the reasons already shown by the petition (pages 16-17) the right of resignation is thus illusory. It would be anomalous that this Court which has so strictly required immediate adjudication with respect to the showing of films of doubtful propriety (cf. Freedman v. Maryland, 380 U.S. 51 [1965]) should acquiesce in dilatory proceedings respecting the rights of these commentators to be heard by their audiences of millions on the most vital topics of the day.

The union respondent's argument against the jurisdiction of the Federal court seems directed to the claim that the suit, in this respect is unnecessary because Petitioners have the right to resign rather than to the issue of whether or not the jurisdiction of the Court has been pre-empted.

Respectfully submitted,

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